Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROSLYN PORTER, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

NATIONSCREDIT CONSUMER DISCOUNT COMPANY; PROTECTIVE LIFE INSURANCE COMPANY; FAIRBANKS CAPITAL CORPORATION; NATIONSCREDIT FINANCIAL SERVICES CORPORATION; NATIONSCREDIT INSURANCE AGENCY, INC, A PENNSYLVANIA CORPORATION; NATIONSCREDIT INSURANCE AGENCY, INC, AN ARIZONA CORPORATION; NATIONSCREDIT INSURANCE CORPORATION; NATIONSCREDIT CONSUMER CORPORATION; BANK OF AMERICA, N.A., AND OTHER DEFENDANTS WHO ARE YET UNKNOWN TO THE PLAINTIFF CLASS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court below properly dismissed Petitioner's claim for actual damages under the Truth in Lending Act ("TILA"), 15 U.S.C. §1640(a)(1), because she did not plead detrimental reliance?

II. Whether the Court below should have examined the substance of charges labeled as "premiums for credit life insurance" to determine whether these "premiums" are legitimate insurance charges or rather "finance charges" under TILA and under the Home Ownership Equity Protection ("HOEPA") provisions of TILA, as required by this Court's precedent and holdings of other Circuit Courts of Appeal?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 12

CONCLUSION 33

APPENDIX

Circuit Court Opinion 1a
District Court Order (2/11/2004) 4a
Order Denying Rehearing 10a
Relevant Provisions Involved 12a

TABLE OF AUTHORITIES

Page

CASES

ADAMS V. PLAZA FINANCE COMPANY, INC., 168 F. 3D 932 (7TH CIR. 1999) 23, 24
AFFILIATED UTE CITIZENS V. UNITED STATES, 406 U.S. 128, 31 L.ED. 2D 741, 92 S.CT.1456(1972) 13, 20
BASIC, INC. V. LEVINSON, 485 U.S. 224, 99 L. ED.2D 194, 108 S. CT. 978 (1988) 13
BEACH V. OCWEN, 532 U.S. 410 (1998) 18
BIZIER V. GLOBE FINANCIAL SERVICES, 654 F. 2D 1, 3 (1ST CIR. 1981) 12
BRIDGE V. PHOENIX BOND & INDEMNITY CO., ___ U.S.___, 170 L.ED. 2D 1012, 128 S.CT. 2131 ..... 9, 13, 14
COLONIAL AMERICAN LIFE INSURANCE CO V. COMMISSIONER, 491 U.S. 244, 109 S. CT. 2408, 105 L. ED. 2D 199 (1989) 28
EDWARDS V. YOUR CREDIT, INC., 148 F. 3D 427 (5TH CIR. 1998) 23, 24
FORD MOTOR CREDIT CO. V. CENANCE, 452 U.S. 155, 158, 68 L.ED.2D 744, 101 S.CT. 2239 (1981) 12, 22, 23
FORD MOTOR CREDIT V. MILHOLLIN, 444 U.S. 555, 100 S. CT. 790, 63 L.ED.2D 22(1980) 13
GIBSON V. BOB WATSON CHEVROLET-GEO, 112 F. 3D 283 (7TH CIR. 1997) 23, 30, 31
GREGORY V. HELVERING, 293 U.S. 465, 469 (1935) 24
HELVERING V. LEGIERSE, 312 U.S. 531, 61 S. CT. 646, 85 L. ED. 996 (1941) 22, 25, 26
IN RE MURRAY, 239 B.R. 728, 734 (BANKR. E.D. PA. 1999) 21
IN RE RUSSELL, 72 B. R. 855 (BANKR. E.D. PA. 1987) 21
IN RE SMITH, 289 F.3D 1155 (9TH CIR. 2002) 19
IN RE STEWART, 93 B.R. 878 (BANKR E.D. PA 1988) 30
KELLER V. COMMISSIONER, 312 U.S. 543, 61 S. CT. 651, 85 L.ED. 1032 (1941) 23, 25, 26
KENTY V. BANK ONE, COLUMBUS, N.A., 92 F.3D 384, 393 (6TH CIR. 1996) 28

LOPEZ V. ORLOR, INC., 176 F.R.D. 35, 40 (D.CONN. 1997) 21
MILLS V. ELECTRIC AUTOLITE CO., 396 U.S. 375, , 24 L.ED 2D 593, 90 S.CT. 616(1970) 13
MOURNING V. FAMILY PUBLICATION SERVICE, INC., 411 U.S. 356, 377, 36 L. ED.2D 318, 93 S. CT. 1652 (1973) 12
PERRONE V. GMAC, 232 F.3D 433 (5TH CIR. 2000) 20
PETERS V. JIM LUPIENT OLDSMOBILE CO., 220 F.3D 915 (8TH CIR. 2000) 20, 21
SMITH V. FIDELITY CONSUMER DISCOUNT CO., 898 F.2D 896 (3D CIR. 1988) 18, 19
STOUT V. J.D. BYRIDER, 228 F.3D 709(6TH 20
TURNER V. BENEFICIAL CORP., 242 F.3D 1023 (11TH CIR. 2001) 20
UTLEY V. COMMISSIONER, 906 F.2D 1033, 1037 (5TH CIR. 1990) 24
WATERMAN S.S. CORP V. COMMISSIONER, 430 F.2D 1185(5TH 24

STATUTES

15 USC 1602(aa) 16
15 U.S. C. §1602(u) 21
15 U.S. C. §1604(b) 23, 31
15 U.S.C. §1605 10
15 U.S.C. §1605(a) 25
15 U.S.C. §1610 18
15 U.S.C. §1635 17
15 U.S.C. §1639 ..... 16, 19
15 U.S.C. 1640(a) 16
15 U.S.C. §1640(a)(1) 13, 15
15 U.S.C. §1640(a)(4) 13
15 U.S.C. §1640(b) 21, 23
15 U.S.C. §1640(d) 18, 20
18 U.S.C. §1964(c) 14
28 U.S.C. § 1254(1) 2
28 U.S.C. §2101(c) 2

29 U.S.C. §1101 ..... 5, 21, 32
29 U.S.C. §1103 32
40 P.S. §1007.2(a)(2) 29
82 Stat. 146 15
H.R. 1858 ..... 16, 17
H.R. 2399 17
P.L.90-321 (May 29, 1968) 15
P.L. 93-495 §408 (Oct. 28, 1974) 15
P.L. 104-29 (Sept 30, 1995) 17

REGULATIONS

12 C.F.R. § 2.3 32
12 C.F.R. §226.18 30
12 C.F.R. §226.23(a)(3) 18
12 C.F.R.226.23 21
12 CFR 226.32(c) 18
12 CFR226.32(d) 18
12 CFR 226.4(a) 25

OPINIONS BELOW

The District Court's unreported Opinion on the NationsCredit Respondents' Motion to Dismiss, dated February 9, 2004 is attached and available at Docket No. 03-3768 (E.D. Pa.), Item 38.

The Opinion of the Court of Appeals for the Third Circuit on Petitioner's appeal is attached in the Appendix and reported are 285 Fed. Appx. 871, 2008 WL 3318999 (3d. Cir. 2008). The unreported Opinion of the Court of Appeals for the Third Circuit on Petitioner's Motion for Rehearing En Banc is attached in the Appendix.

The following Opinions of the District Court are not included in the Appendix because they did not decide the issues identified in the Questions Presented on Appeal:

> The Opinion on Petitioner's Motion for Class Certification, which is reported at 229 F.R.D. 497 (E.D. PA. 2005); Opinion on Protective Life Insurance Company's Motion for Summary Judgement, available at 2005 WL 1819974 (E.D. Pa Aug. 1, 2005); Opinion on NationsCredit's Motion for Summary Judgment, available at 2006 WL 851307 (E.D. Pa. March 31, 2006); Opinion on Petitioner's and NationsCredit's Motions for Reconsideration of the March 31, 2006 decision, available at 2006 WL 1737544 (E.D. Pa. June 22, 2006); Opinion following a Bench Trial is available at 2006 WL 3333837 (E.D. Pa. November 14, 2006); Opinion on Petitioner's Motion for Reconsideration of the Trial decision

is available at 2007 WL 30117 (E.D. Pa. January 3, 2007).

JURISDICTION

The Final Opinion of the Court of Appeals for the Third Circuit, denying Petitioner's Motion for rehearing en banc, was entered on September 11, 2008. This Petition for a writ of certiorari is filed within 90 days of that date. 28 U.S.C. §2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

(see appendix)

STATEMENT

In May of 1997 the NationsCredit respondents and Protective Life Insurance Company ("PLI") entered into common contracts for a two-year period, the purpose of which was to effectuate a sham insurance transaction to remove charges labeled "premiums" from the finance charges for (1) purposes of TILA disclosures and calculations of consumer loan terms and (2) calculation of costs for HOEPA requirements. 15 U.S.C.§1601 et seq. These "premiums" are not for insurance at all, but a ruse to avoid accurate disclosure under TILA of financial terms and HOEPA disclosures. Alternatively, even if these are legitimate insurance charges, there are hidden finance charges in the "premium." Because the "premium" was included in the amount financed,

Petitioner was charged interest on it.

These contracts were structured using PLI as a "front" to create the appearance of true "insurance" transactions, but due to the absence of transfer or distribution of risk to the insurer, these "premiums" are in fact finance charges. Petitioner was informed falsely on her TILA Disclosure Statement and HUD-1 Settlement Statement that the entire "premium" was paid to PLI, when in fact only roughly 5% was paid to PLI.

As a result, Petitioner was deprived of (1) material pre-closing warnings and disclosures of financial terms under HOEPA; (2) accurate disclosure of material financial terms of her loan as required by TILA. As a further result, Petitioner was deprived of meaningful choice of whether to go to closing and meaningful choice whether to cancel her loan.

Pursuant to these contracts:

(1) an un-capitalized company, NationsCredit Consumer Discount Company ("NCCDC") closed Petitioner's loan based upon documents and computations performed by a central computer;
(2) an affiliated company; NationsCredit Insurance Agency, ("NCIA") allegedly acted as an insurance agency;
(3) an affiliated company, NationsCredit Insurance Corporation,("NCIC") acted as a reinsurer of the unaffiliated insurance company, PLI;
(4) and the parent of all affiliated companies, NationsCredit Consumer Corporation,

("NCCC") guaranteed the reinsurer's performance to PLI;
(5) funds to payoff the Petitioner's preceding mortgage company and other payments related to Petitioner's refinance were written on an account of an affiliated company, NationsCredit Financial Services Corporation("NCFS").
(6) a trust fund account was created that contained ERISA certifications, which that Act requires for employee benefit plans, by 2 different institutional Trustees.

The admitted purpose of the Reinsurance Agreement between PLI, NCIC and NCCC was to enable the parent, NCCC, to guarantee to Protective the payment and performance of obligations by NCIC, and to assure PLI that a responsible party would guarantee these payments. A guarantee is not standard in credit life insurance ("CLI") Reinsurance agreements among insurance companies and lending institutions. The guarantee was one of performance and not of collection because PLI did not need to wait for NCIC's default to look to NCCC. As a result of these contracts, PLI had no risk. Absent the transfer of risk to PLI, these charges are not for legitimate "premiums."

NationsCredit decided not to renew its relationship with PLI. On September 24, 1999 an alleged "Recapture and Termination Agreement" was entered into by PLI, NCIC , NCIA, and Equicredit Corporation of America, successor to NCCC as guarantor. Pursuant to this Recapture Agreement, NCIC was allegedly paid a recapture fee of $32,903,360; and PLI was allegedly paid $46,464,837 "to assume the

risks" of the policies it recaptured. The calculations of the alleged recapture payments exists nowhere but in the recapture agreement.

The record contains contradictory evidence on the issue of whether the "recapture" by Protective terminated the obligations of NCIC and NCCC. In Deposition testimony, Susan Welsh, CEO of NCFS and Senior Vice President of Bank of America, testified that the guarantee was extinguished by the recapture. However, a letter dated December 11, 2000 from John Hickey, then President of NCIC, to PLI's actuary, T. Michael Presley, states the guarantee by NCCC and indemnification by NCIC continued in effect despite the alleged "recapture." If the guarantee and indemnification remained in effect, there is no consideration for the recapture fee.

Corresponding to the CLI charges of $103,587,671.82 in "premiums" for the two-year contract period, the funding of the NationsCredit Respondents KESOP[1] increased from $16 million in 1996 to $103,386,250 in 1999, as disclosed in SEC filings. Corresponding to the "recapture" in 1999, the KESOP was decreased by $32,715,583, as reported in SEC filings for year-end 2000, with payments going to 5 key employees. Reports for a Trust account allegedly containing the "premiums" are labeled "Business Retirement Programs" and contain ERISA certifications, which are only required under *29 U.S.C.§1101* et seq for employee compensation trust funds. The Trust Fund established under the contracts

[1]KESOP stands for Key Employee Stock Option Plan.

was reduced by roughly $33 million (from $84 million to $50.9 million) sometime between December 1999 and October 2001, according to deposition testimony of Susan Welsh. Thus, there are hidden finance charges of either the "recapture fee" or the amounts in excess of the $46 million allegedly paid to PLI. All these records were filed with the District Court.

Petitioner was charged $3,281.98 as a "premium" for CLI on a loan for $33,265.43, dated March 26, 1998, to refinance a prior mortgage, which had been her first mortgage ever.

On March 26, 1998, Ms. Porter was 41 years old. PLI offered a 10-year level term life insurance policy in the amount of $250,000.00 for a female 45 years old for a total premium of $2,425.00 beginning in June 1999, according to Best Book, an insurance industry publication. There are hidden finance charges in the excess amounts charged to Petitioner.

The rate charged for the "premium" was admitted to be 140% of the allowed rate of the Pennsylvania Insurance Department, but no documents were ever produced showing the Insurance Department's approval of this increase. There are hidden finance charges in the 40% overcharge.

Petitioner inherited her home at 7110 Grays Avenue, Philadelphia Pa. and lived there all her life except when she briefly lived in New Jersey. During her marriage Petitioner's husband took care of the household finances. Petitioner entered her first mortgage ever with Associates Consumer Discount Company on October 10, 1997 for a loan to pay for home

improvements.

Petitioner wanted a loan with a lower interest rate and lower monthly payments than the one she had with Associates. She was interviewed on the phone and made one visit to the Bensalem office of NCCDC to sign loan papers on March 26, 1998. Petitioner rejected CLI during her pre-closing telephone conversation because she already had life insurance from 2 sources–her employer and ex-husband. Yet, respondents computer-generated, pre-closing loan-approval documents contain computations for Petitioner's loan that included charges for a "CLI premium."

Petitioner met with one woman at closing in Bensalem and signed papers already completed with the financial terms as instructed by the woman and without reading them first.

The $3,298.81 "premium" was disclosed as part of the amount financed on the TILA Disclosure Statement ("DS"), and not included in the finance charges or APR. In Pennsylvania, NCCDC's standard practice was to give borrowers an unsigned copy of a written request for the "insurance" on the TILA DS.

As a result of Respondents' practices, Petitioner entered into a contract obligating her to pay a total of $64,667.49 to NCCDC over 15 years. As a result of Ms. Porter's loan transaction, Ms. Porter's principal balance on the Note owed to NCCDC was $33,265.43; her pay-off to Associates was $25,840, a difference of $7,425.34.

Out of the $7,425.34, Ms. Porter received a check for $2,084.36; the remainder of $5340.98 went to fees

and cost. Including the $3,2821.98 "premium," the total costs exceed 8% of the principal loan amount, creating a HOEPA loan.

Including finance charges, Petitioner obligatedherself to pay $17,465 more to NCCDC than she would have paid to Associates-- in exchange for the $2,084.36. It is undisputed that Ms. Porter was not given a pre-closing HOEPA notice.

Disbursement checks on Petitioner's loan were written by a central computer and drawn on an account of NCFS, not NCCDC, but no check was written for the "premium." NCCDC was not capitalized and had no ability to write checks.

By letters dated November 16, 2000, and November 22, 2000 Counsel for Plaintiff sent notice to rescind the transaction. When NCCDC failed to take steps to honor the rescission as required by the Truth in Lending Act, on March 14, 2001, Ms. Porter initiated a timely Adversary Proceeding No. 01-157 in the United States Bankruptcy Court for the Eastern District of Pennsylvania. The District Court withdrew the reference upon Petitioner's motion after the Bankruptcy Judge ruled he lacked jurisdiction over a proposed class action that proposed to include non-bankrupt borrowers.[2]

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[2]In District Court, Petitioner sought and was denied class certification on behalf of approximately 62,000 borrowers charged for the "premiums", and for a sub-class of approximately 1300 Pennsylvania residents who did not receive the signed written requests and who were charged unconscionable amounts.

While the case was in the Bankruptcy Court, James Douglas Crowell, Esquire, an in-house attorney for respondents, provided an Affidavit[3] during discovery that contained misrepresentations both as to the amounts and method of payment of the "premiums" to PLI, concealing the allocation of funds among the Respondents. In essence, the Affidavit falsely states that the "premium" charged to Petitioner minus a commission was sent by wire transfer, and not by physical check, to PLI.

Based in part upon this Affidavit, in her Second Amended Complaint–Class Action,[4] Petitioner claimed that the NationsCredit Respondents engaged in common practices based upon common contracts and thereby violated the disclosure provisions of HOEPA, TILA and Regulation Z by:

> (1) retaining all or a portion of the "Premiums" or "commissions" that were not paid to an insurance company at all, and not disclosing these as part of the Finance Charges under TILA and HOEPA;
>
> (2) not giving clear and conspicuous disclosures;

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[3]This Affidavit was submitted to substantiate NCCDC's contention that it could not produce a photocopy of a check disbursing the "premium" to PLI

[4]When analyzing the District Court's grant of respondent's Motion to dismiss, this Court must accept as true all the factual allegations contained in Petitioner's complaint. *Bridge v. Phoenix Bind and Indemnity Co.*, ___ U.S.___, 170 L.Ed. 2d 1012, 128 S.Ct. 2131, (2008) .

(3) removing charges from finance charges when they did not meet the requirements for removal under 15 U.S.C. §1605 (for credit life insurance premiums);
(4) incorrectly disclosing the finance charges because they did not disclose the proper term of the insurance;
(5) not providing pre-closing HOEPA warnings and disclosures; and
(6) alternatively, mis-disclosing the Itemization of Amount Financed.

Petitioner sought TILA actual, statutory and enhanced HOEPA damages and attorneys' fees and costs in her complaint on behalf of herself and all others similarly situated.[5]

On February 9, 2004, the first District Court Judge, Judge Newcomer dismissed (1) the class TILA claim for actual damages because Petitioner did not plead detrimental reliance, which the Court found is required by the face of the statute, Appendix at 7a, and (2) what he called the TILA "alternative argument" that the exact amount retained must be disclosed, reasoning that the respondents met the TILA requirements by disclosing that the lender may be retaining a portion of the charges, Appendix at 6a, 7a. He did not address Petitioner's claim for HOEPA damages.[6]

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[5]Petitioner also asserted state law claims, for which she does not seek review by this Court. Judge Newcomer found against Petitioner on her state law claims for lack of reliance as the cause of her damage.

[6]On February 11, 2004 Judge Newcomer allowed Plaintiff leave to

Judge Newcomer denied Petitioner's Second Motion class certification on July 27, 2005 and granted summary judgment in part to PLI on August 1, 2005. Judge Newman found Petitioner's arguments about "risk-shifting" meritless for purposes of the state law claims of deception and unfair trade practice.

Judge Newcomer denied class certification, finding: (1) individual issues of reliance and damages completely permeate both of the proposed classes; (2) petitioner and her counsel are inadequate; and (3) lack of superiority because damages are limited to $500,000.00 in statutory damages under TILA and reliance is required under both TILA and Pennsylvania law.

Judge Newcomer died shortly thereafter without ruling on the NationsCredit respondents pending Motion for Summary Judgment. When ruling on NationsCredit's summary judgment, Judge Stengel, held that only 2 claims survived Judge Newcomer's rulings, which are not germane to this Petition.[7] He did not address the claim the insurance is in reality a finance charge or the HOEPA claim.

After a Bench trial Judge Stengel ruled against Petitioner on November 15, 2006, Petitioner filed a timely appeal to the Court of Appeals for the Third

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file a Third Amended Complaint.

[7]Judge Stengel also ruled that there is no evidence of a "creditor" as defined by HOEPA. In the event this Court vacates the decision below regarding the "premiums," this ruling should be re-visited by the lower court on remand.

Circuit, which affirmed the District Court decision. Appendix at 1a-3a. Petitioner filed a Motion for rehearing en banc, which was denied on September 11, 2008. Appendix at 10a-11a.

REASONS FOR GRANTING THE PETITION

A. THE COURT BELOW ERRED WHEN RULING THAT DETRIMENTAL RELIANCE IS REQUIRED FOR ACTUAL DAMAGES UNDER TILA.

1. The Plain Language Of TILA Does Not Require Detrimental Reliance For Actual Damages And Congress Has Rejected This As A Requirement.

Absent a clear indication of legislative intent to the contrary, statutory language controls its construction. *Ford Motor Credit Co. v. Cenance,* 452 U.S. 155, 158, 68 L.Ed.2d 744, 101 S.Ct. 2239 (1981). Nothing in the plain language of the statute or its legislative history allows a Court to impose a reliance requirement for actual damages, particularly when the consumer can demonstrate a violation of a material disclosure.

TILA is a remedial statute which is designed to balance the scales previously "thought to be weighed in favor of lenders," in favor of borrowers. *Bizier v. Globe Financial Services,* 654 F. 2d 1, 3 (1st Cir. 1981). The Truth in Lending Act reflects "a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.'" *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 377, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973). The TILA requires

creditors to meaningfully disclose all credit terms to consumers to avoid the uninformed use of credit. *Ford Motor Credit v. Milhollin*, 444 U.S. 555, 100 S. Ct. 790, 63 *L.Ed.2d 22(1980).*

When granting Respondent's Motion to dismiss, the District Court held that detrimental reliance is required on the face of the statute for actual damages under section 1640(a)(1) of TILA (ignoring the HOEPA aspects of this case). Appendix at 7a. The jurisprudence of the United States Supreme Court supports a contrary conclusion, *Bridge v. Phoenix Bond & Indemnity Co.*, ___ U.S.___, 170 L.Ed. 2d 1012, 128 S.Ct. 2131, (2008), particularly for omissions of, or inaccurate disclosure of, material terms. *See, Affiliated Ute Citizens v. United States*, 406 U.S. 128, 31 L.Ed. 2d 741, 92 S.Ct.1456(1972); *Basic, Inc. v. Levinson*, 485 U.S. 224, 99 L. Ed.2d 194, 108 S. Ct. 978 (1988); *Mills v. Electric Autolite Co.*, 396 U.S. 375, , 24 L.Ed 2d 593, 90 S.Ct. 616(1970).

The TILA provides, "(a) Except as otherwise provided in the section, any creditor who fails to comply with any requirement imposed under this chapter...with respect to any person *is liable* to such person in an amount equal to the sum of – (1) actual damages sustained by such person *as a result* of the failure;" 16 U.S.C. §1640(a)(1)(emphasis added).

Furthermore, the HOEPA provisions awards enhanced damages, *unless the respondents prove lack of materiality*, thus creating a strict liability standard that respondents must defeat. 15 U.S.C.§1640 (a)(4).

Recently, in *Bridge* this Court examined language similar to that here when analyzing the required elements of a mail fraud claim under RICO, and rejected a reliance requirement either as an element of a claim or as a prerequisite to proximate cause. __ U.S.__, 128 S. Ct. 2131. In *Bridge*, the Court reasoned that Congress clearly created a statutory private right of action and it is not for a court to limit that right by imposing a common law fraud requirement of reliance. *Id.*

The RICO provision examined in *Bridge*, provides that "[a] person injured in his business or property *by reason* of a violation of section 1962...may sue...and shall recover threefold the damages he sustains..." (Italics added).18 U.S.C.§1964(c).

The differences in the two statutes are insufficient to impose a reliance requirement. The word "actual" in TILA does not suffice, for it means simply "in existence; real; factual"; "result" means "to occur or exist as a consequence of a particular cause". *American Heritage Dictionary*. Thus, under the plain language, all the TILA requires is factual damage suffered as a consequence of a particular cause. *Non-compliance* with the TILA statute is the *cause* identified by Congress–not reliance on the non-compliance. The damages are the excess charges, including interest, and are real and determined mathematically. The TILA statute requires nothing more.

The *Bridge* Court recognized that "reliance is a specialized condition that happens to have grown up with common law fraud." *U.S.___, 128 S. Ct. at 2143, citing Anza*, 547 U.S. at 477. "That 'specialized

condition' whether characterized as an element of the claim or as a prerequisite to establishing proximate causation, simply has no place in a remedial scheme keyed to...a statutory offense that is distinct from common-law fraud and that does not require proof of reliance." *Id.*

Similar to RICO, the TILA and its HOEPA provisions are remedial statutes containing statutory private rights of action that a court should not be limiting by imposing a pleading requirement--or as an element of the cause of action as proximate cause--a proof requirement of reliance when Congress has not imposed one.

The holding below is not faithful to the plain language of the statute, which had been in effect for over 30 years without amendment. This Court should be faithful to the plain language of the statute and refuse to read into the TILA statute a reliance requirement that is clearly absent.

Moreover, the legislative history demonstrates no reliance requirement in the TILA and attempts to include one for actual damages have been rejected by Congress. As originally enacted, the TILA did not contain a provision for actual damages, *82 Stat. 146, 157, P.L.90-321 (May 29, 1968).* It did, however, provide for statutory penalties and attorney's fees and costs. Congress amended TILA in 1974 and added a provision for *"**any actual damages** sustained by such person as a result of the failure"* to comply. *88 Stat. at 1518, P. L. 93-495 §408 (Oct. 28, 1974).* 15 U.S.C. §1640(a)(1). This provision had remained unchanged since 1974, despite subsequent legislative attempts to include a reliance

requirement for actual damages.

In 1994, Congress added provisions to TILA governing high cost, non-purchase money mortgages (hereafter "HOEPA" provisions). These are defined as loans where the annual percentage rate at consummation exceeds 10 % of the yield on Treasury securities, or the greater of $400.00 or 8% of the total loan amount. 15 U.S.C.§1602(aa). In such a case, additional pre-closing warnings and financial disclosures, such as the APR and monthly payment are required. 15 U.S.C. §1639. The HOEPA provisions *added* enhanced damages for its violation, without amending the actual damages provision.

Significantly, *H.R. 1858*, introduced into the House as the *Financial Institutions Regulatory Relief Act of 1995,* included proposed amendments to TILA actual damages provision, stating at *Section 112:*

"Paragraph (1) of section 130(a) of the Truth In Lending Act (15 U.S.C. 1640(a)) is amended to read as follows:

> (1) Any actual damages sustained by such person as a result of the failure (to the extent the person demonstrates reliance on the inaccurate disclosure which prevented the person from accepting better credit terms actually available to the person from another creditor) and the amount of such damages shall be the difference between the finance charges actually paid and the finance charge that would have been paid over the same period under credit terms

applicable with respect to credit actually available to the person from another creditor."

The Committee reporting on *H.R.1858* noted at section 111 that "To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure." *Comm. Rpt. 104-193 at 99.*

H.R. 1858 was *not* enacted.

Rather, *H.R. 2399, Pub. L. 104-29 (Sept 30, 1995)* was enacted as the "Truth in Lending Act Amendments of 1995." *(H.R. 2399, Sept. 27, 1995). The Truth Lending Act Amendments of 1995* left undisturbed the provision governing actual damages. Thus, under the plain language of the statute, there is no reliance requirement, and the addition of a reliance requirement has been specifically rejected based upon this legislative history.

2. The Statutory Scheme Demonstrates That Reliance Is Not Required For Actual Damages For Violations of Material Disclosures.

TILA and Regulation Z's scheme include a hierarchy of disclosures and rights. A major distinction is drawn under TILA, 15 U.S.C. §1635, for loans where a borrower grants a security interest in his principal dwelling. A borrower has an unqualified right to rescind such a loan for any reason up until midnight of the third business day following the transaction. 15 U.S.C.§1635(a). This period is often referred to as the "cooling off period." *Smith v. Fidelity Consumer*

Discount Co., 898 F.2d 896 (3d Cir. 1988). This right to rescind may be extended in the case of *material* non-disclosures for a period of time not to exceed 3 years from the date of the transaction. *See, Beach v. Ocwen,* 532 U.S. 410 (1998). During this 3-day period, the creditor may not disburse any funds, absent a waiver due to an emergency. 12 C.F.R.§226.23(c).

The rescission provisions reflect Congress's desire to keep homeowners from placing their home at risk without a clear understanding of the risks and benefits of the transaction. S.Rep No. 368, 96th Cong., 2d Sess. 28, reprinted in 1980 U.S.C.C.A.N. 236, 264. Indeed, the rescission right is specifically exempt from the general rule that TILA does not alter state laws regarding the validity and enforceability of contracts. 15 U.S.C.§1610(d).

Furthermore, TILA grants the extended right to rescind *only* when a *material* disclosure is wrong or withheld. *Regulation Z*, 12 C.F.R. §226.23(a)(3), fn 48 identifies *the material disclosures* as:

> "....the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule and the disclosures and limitations referred to in section 226.32(c) and (d)." (i.e., the HOEPA high cost loan provisions).[8]

[8]With limited exception, these track the disclosures defined by the statute as "'material disclosures." 15 U.S.C.§1602(u).

The list contained in Section 226.23(a)(3), fn 48 is an exhaustive list of *material* disclosures. *Smith v. Fidelity Consumer Discount Company*, 898 F. 2d 896.

In addition to creating a right to rescind, the TILA provides for differing damages for a breach of a *material disclosure requirement*, allowing actual, statutory and for high cost (i.e., HOEPA) loans, enhanced damages, 15 U.S.C.§1640, when a security interest is taken in a borrower's principal dwelling.

By comparison, damages are more limited in cases of non-material disclosures. *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (violations of disclosure of the Itemization of Amount Financed is limited to actual damages because not a material term; statutory damages not available). Thus, the TILA statutory scheme grants heightened protections and damages to ensure creditors comply with the material disclosures when a primary dwelling is placed at risk due to a security interest. An even higher level of protection is provided for HOEPA loans, for which lenders must provide pre-closing warnings and financial disclosure of the monthly payment and APR. 15 U.S.C.§1639.

In re Smith, 289 F.3d 1155 (9th Cir. 2002), a *per curiam* decision relied upon by Judge Newcomer when dismissing the claim for TILA actual damages, contains no mention of whether the loan was secured by the borrower's primary residence. Similarly, other cases where Courts of Appeals have held that reliance is required generally do not involve loans where the consumer gave a security interest in the primary residence. *Perrone v. GMAC*, 232 F.3d 433 (5th Cir.

2000)(putative class of car lessees sought actual damages for a violation of the Itemization of Amount Financed); *Turner v. Beneficial Corp.*, 242 F.3d 1023 (11th Cir. 2001)(no security interest taken in the borrower's primary residence); *Stout v. J.D. Byrider*, 228 F.3d 709(6th Cir. 2000) and *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915 (8th Cir. 2000)(both involving claims by automobile purchasers).

Thus, the cases relied upon by Judge Newcomer to dismiss Petitioner's claim for actual damages do not involve material disclosure violations, are inapposite and should not be followed in this case. Instead, this Court should apply the principles of *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S. Ct. 1456 (1972). In *Affiliated Ute*, the United States Supreme Court found, that proof of reliance is not a prerequisite to recovery of damages for failure to disclose under *Rule 10(b)(5)* of the Securities and Exchange Commission. The Supreme Court held, "All that is necessary is that the facts withheld would *be material* in the sense that a reasonable investor might have considered them important in the making of this decision." 406 U.S. at 153, 154, 92 S.Ct. at 1472 (emphasis added).

This Court should follow *Affiliated Ute* here because the Federal Reserve Board has defined certain disclosures as "material" when a security interest is taken in the borrower's primary dwelling. Indeed, the Board's definition relieves a borrower from proving materiality, and particularly in a HOEPA loan where Congress has placed the burden on the lender to prove lack of materiality. 15 U.S.C.§1640(d). Like the Securities Exchange Act, the TILA is to be broadly

construed to effectuate its remedial purpose. To impose a reliance requirement upon a consumer for a material violation of TILA and HOEPA is inconsistent with Supreme Court jurisprudence regarding material non-disclosures.

Moreover, this reading of the statute is consistent with the legislative history of the 1980 amendments when Congress added a provision allowing creditors to correct errors within 60 days of discovery. 15 U.S.C. §1640(b). If reliance is a requirement for actual damages, there would be no incentive for a creditor to correct an error, making this provision meaningless. *In re Russell*, 72 B. R. 855 (Bankr. E.D. Pa. 1987), citing 15 U.S.C. §1640(b)(holding reliance is not required and actual damages are the difference between the cost of credit actually imposed and that disclosed). *See also, Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915 (8th Cir. 2000)(Heaney, J. Dissent)(actual damages under TILA should be measured by the violator's misrepresentation) *citing, In re Murray*, 239 B.R. 728, 734 (Bankr. E.D. Pa. 1999) *and Lopez v. Orlor, Inc.*, 176 F.R.D. 35, 40 (D.Conn. 1997).

Unlike the disclosures at issue in the *Smith, Perrone, Turner, and Peters and Stout* cases, Congress and the Federal Reserve Board have already defined the disclosures at issue in this case as *material.* 15 U.S. C. §1602(u), 12 C.F.R.226.23, fn.48.

Because of the *material* violations alleged in this case, this Court should not impose a reliance requirement for actual damages, particularly when there is none on the face of the statute. Regardless of whether reliance is required in cases of *non-material*

violations, this Court should not find that reliance is required for actual damages based upon violations of material TILA and HOEPA disclosure requirements.

Given the similar remedial natures of the TILA and The Security and Exchange Act, the plain language of the statute and the statutory scheme, this Court should not impose a reliance requirement when a *material* disclosure is at issue in a TILA case. Moreover, a statutory cause of action cannot, without more, support imposing such a requirement under the teaching of *Bridge v. Phoenix*.

B. THE COURT BELOW FAILED TO FOLLOW THIS COURT'S PRECEDENT, CREATING AN IMPLICIT SPLIT IN THE CIRCUITS, WHICH THIS COURT SHOULD RESOLVE WHEN THE COURT BELOW DID NOT EXAMINE THE SUBSTANCE OF THE CLI TO DETERMINE WHETHER THE "PREMIUMS" ARE FOR TRUE INSURANCE OR ARE FINANCE CHARGES UNDER TILA

In *Ford Motor Credit Co., v. Cenance*, 452 U.S. 155, the United States Supreme Court rejected an analysis under TILA that would elevate form over substance. Yet, this is exactly what the Court below did.

By not analyzing the reality of the "premiums" to determine whether these are legitimate premiums or disguised finance charges, the Court below violated two clear lines of this Court's precedent requiring an analysis of the *substance* of (1) an alleged insurance transaction, *Helvering v. LeGierse*, 312 U.S. 531, 61 S. Ct. 646, 85 L. Ed. 996 (1941); *Keller v. Commissioner*,

312 U.S. 543, 61 S. Ct. 651, 85 L.Ed. 1032 (1941) and (2) of TILA charges. *Ford Motor Credit Co., v. Cenance,* 452 U.S. 155, 101 S.Ct. 2239, 68 L.Ed. 2d 744 (1981).

Additionally, the Court below broke with the Courts of Appeals for the Fifth and Seventh Circuits who require analyzing the substance of an alleged insurance transactions to determine whether the "premiums" are excludable from the finance charges for TILA purposes and its HOEPA provisions, *Adams v. Plaza Finance Company, Inc.*, 168 F. 3d 932 (7th Cir. 1999); *Edwards v. Your Credit, Inc.*, 148 F. 3d 427 (5th Cir. 1998).

If these "premiums" and "commissions" are not for insurance but instead belong in the finance charges for TILA purposes, all of the numerical disclosures are inaccurate. Furthermore, including the "premiums" and "commissions" as part of the amount financed allows the creditor to charge interest on this amount. If these numerical disclosures are inaccurate, these inaccuracies cannot be remedied by disclosing that the lender may be retaining a portion of the charges. 15 U.S. C. §1604(b). *See, Gibson v. Bob Watson Chevrolet-Geo,* 112 F. 3d 283 (7th Cir. 1997)(Posner, J.)(Numerical inaccuracies cannot be remedied by use of Model Form).

The Fifth and Seventh Circuit Courts of Appeals have recognized that the Supreme Court and many other courts have applied the substance-over-form doctrine to consumer finance law. *See, Edwards v. Your Credit, Inc.*, 148 F.3d 427 (citing cases); and, *Adams v. Plaza Finance Company, Inc.* ,168 F. 3d 932, citing, *Ford Motor Credit Company v. Cenance.*

The *Edwards* court stated this is akin to the substance-over-form doctrine in tax law in which a court looks past the *label* the parties give to a structure to determine its economic reality. *Edwards*, 148 F.3d at 436, citing *Gregory v. Helvering*, 293 U.S. 465, 469 (1935)(holding that economic substance of transaction rather than its form determines tax treatment); citing, *Waterman S.S. Corp v. Commissioner*, 430 F.2d 1185(5th Cir. 1970)(courts will look beyond superficial formalities of a transaction to determine proper tax treatment) overruled in part on other grounds, *Utley v. Commissioner*, 906 F.2d 1033, 1037 (5th Cir. 1990). Although the *Adams* and *Edwards* cases involved "non-filing insurance," the principles apply here equally.

The *Edwards* Court noted that, "Courts that have applied a substance-over-form analysis to look beyond the express terms of a policy to the surrounding circumstances have tended to find questions of material fact preventing summary judgment or have found violations of TILA, Regulation Z, and, in some cases, state law." *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 436-7. The *Edwards* Court further noted, "By contrast, courts that have only looked at a policy's express terms have tended to reject similar arguments..." 148 F. 3d at 437.

Here, the Court below improperly failed to analyze the *substance* of the transaction and the underlying contracts when rejecting Petitioner's argument that TILA and HOEPA were violated.

1. The Finance Charges are Under-disclosed Because There Is No True Insurance.

The law, the facts, and accounting principles all dictate a finding that the "premium" charges here are not for insurance, but rather are finance charges under TILA—or, at a minimum there is a genuine issue of material fact precluding summary judgment.

A "finance charge" for TILA purposes is defined as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U.S.C. §1605(a); 12 C.F.R.§226.4(a).

If there is no *insurance* transaction, these "premiums" are finance charges under the definition at Section 226.4(a), regardless of the label attached to them by Respondents. Thus, the *first inquiry* is whether these "premiums" were charges for a transaction involving shifting of and distribution of risk, which would constitute a true insurance transaction, and therefore, possibly removable from the finance charge.

This Court has held previously that the elements of risk-shifting and risk-distributing are essential to a life insurance contract. *Helvering v. LeGierse*, 312 U.S. 531, 540, 61 S.Ct. 646, 649,85 L. ED. 996 (1941). In the companion cases of *Helvering v. LeGierse*, 312 U.S. 531, 61 S. Ct. 646, 85 L. Ed. 996 (1941) and *Keller v. Commissioner*, 312 U.S. 543, 61 S. Ct. 651, 85 L.Ed. 1032 (1941), the Court examined the nature of alleged insurance transactions for purposes of tax treatment.

When upholding the Commissioner's position that no true insurance transaction existed, the Supreme Court stated,

> "Historically and commonly insurance involves risk-shifting and risk-distributing.That life insurance is desirable from an economic standpoint as a device to shift and distribute risk of loss from premature death is unquestionable. **That these elements of risk-shifting and risk-distributing are essential to a life insurance contract is agreed by courts and commentators."** (Emphasis added). *Helvering v. LeGierse*, 312 U.S. at 540, 61 S. Ct. at 649.

In *Helvering* and *Keller*, decedents had taken out a life insurance policy and annuity on the same day. The life insurance would not have been sold without the purchase of the annuity. The Internal Revenue Service assessed deficiencies because the "proceeds" were not properly excluded from the decedents' estates for tax purposes because these were not true "insurance."

The *LeGierse* and *Keller* Courts analyzed the transactions at issue and agreed with the IRS, finding no true insurance transactions, despite the parties labeling the transactions as including a "life insurance policy." These courts squarely held that when analyzing whether an insurance risk exists, the two "contracts" must be considered together. See, *LeGierse*, 312 U.S. at 541, 61 S. Ct.at 650. Furthermore, the Court refused to exalt form over substance when making such an analysis. The Court stated, "...the mere presence of customary provisions does not create a risk." 312 U.S. at 542, 61 S. Ct. at 650.

Likewise, the mere practice by the Respondents here of labeling the charges as "insurance," calling them "policies," and (*assuming arguendo*), submitting them to a state insurance department does not create risk. It is the *transaction* itself that should shift and distribute risk for a true insurance transaction to exist under the teaching of these cases. Furthermore, *all* the contracts must be examined to determine if an insurance risk exists.

In this case, the guarantee by NCCC, the parent of all the other corporations, performs the same function as the annuities in the *Keller* and *LeGierse* cases—namely, it removes risk from PLI. Indeed, the "Reinsurance Contract" in this case allows PLI to seek payment from NCCC, the parent of NCCDC, without first attempting to collect from NCIC, the alleged reinsurer.

Thus, the ultimate beneficiary of the "insurance," the parent NCCC, guaranteed its own "policy." That an insurer can look to its beneficiary for payment of an "insurance claim" is a legal absurdity. Because as a matter of law no risk shifted to PLI, this "credit insurance transaction" is a sham. Thus, as a matter of law, the charges are finance charges under the TILA.

Alternatively, if there is any insurance relationship in this case, it is an investment risk "insurance," for it "insures," in addition to the risk of death, the *risk of refunds of the premiums*, according to PLI's actuary. It insures *the risk to the lender* financing the premiums that a refund may be required, thus interrupting its income stream. See, *Colonial*

American Life Insurance Co v. Commissioner, 491 U.S. 244, 109 S. Ct. 2408, 105 L. Ed. 2d 199 (1989)(holding that reinsurance contract involving indemnification of the primary insurer for a ceding fee is an asset purchase in the form of an income stream and not true insurance.) See also, *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 393 (6th Cir. 1996)(holding that when a bank purchases insurance to protect its own security interest and passes costs to borrowers, it does *not* engage in the practice of insurance under the McCarren-Ferguson Act). Finally, GAAP principles require that the substance of a transaction must be examined. They also recognize that investment risk is not an insurable risk. FASB No. 113, paras. 57,58.

The transaction here is exactly the type that cannot be treated as a true *insurance* under the reasoning of the United States Supreme Court in *LeGierse* and *Keller*, and the Courts of Appeals for the Fifth, Sixth, and Seventh Circuits in *Edwards*, *Kenty* and *Adams* because no risk has been shifted or distributed to PLI.

Indeed, the transaction in this case is not even typical of CLI reinsurance transaction in the industry because a guarantee by a parent is uncommon, according to John Hickey, the former President of NCIC. By comparison, the evidence before the District Court showed that contracts between NationsCredit respondents and other insurers, and the prototype contract used by its consultant do not include a guarantee of the "reinsurance" by the reinsurer's parent.

Respondents admit there was no risk to PLI. PLI's actuary/witness testified that the risk followed the reserves in this case, and the risk was with NCIC until a "recapture" of the risk by PLI in 1999. James Douglas Crowell, Esquire, NationsCredit's in-house attorney, testified similarly at deposition. Susan Welsh testified the guarantee terminated upon the recapture. And, documentary evidence stated that the arrangement with PLI was so that NationsCredit would pay a small fee to PLI to use it papers to write policies.

Just as the Supreme Court has in *Colonial American, LeGierse and Keller*, and the Fifth Circuit in *Edwards*, the Sixth Circuit in *Kenty* and Seventh Circuit in *Adams*, this Court should examine the *substance* of the alleged insurance transaction here and should not exult form over substance when deciding if the "premiums" are finance charges. This Court should find that *no* insurance transaction existed because there is no risk-shifting or risk-distributing to PLI. If there is no insurance, there is no "CLI." The contracts and practices of respondents are nothing more than an artifice to remove the charges from the finance charges for HOEPA and TILA purposes by labeling them as "CLI premiums." Indeed, for a Pennsylvania borrower like Petitioner who gave a first mortgages on her residence, Pennsylvania law removes such charges from its definition of CLI. 40 P.S. §1007.2(a)(2).

2. Alternatively, there are hidden finance charges in the "premium."

Even if this Court finds that the contracts established a true "insurance" transaction, this Court

should find improper the dismissal of the "fee splitting" claims.

In Gibson v. Bob Watson Chevrolet-GEO, 112 F.3d 283 (7th Cir. 1997)(Posner, J.), the Seventh Circuit Court of Appeals addressed the issue of an alleged hidden finance charge contained in an automobile warranty. The *Gibson* court noted that such allegations, if proven, raise two potential TILA claims.

First, when a dealer marks up a warranty higher in a credit transaction than it would in a cash transaction, the extra charge may be a hidden finance charge that must be disclosed as a finance charge. *Gibson v. Bob Watson Chevrolet-GEO,* 12 F.3d at 284, 285; See also, *In re Stewart,* 93 B.R. 878 (Bankr E.D. PA 1988). The second potential violation may be an incorrect statement of the Itemization of Amount Financed in the event the dealer retains a portion of the warranty charge and the breakdown of payments is not disclosed as required by 12 C.F.R. §226.18 (c). 112 F.3d 285. The *Gibson* Court recognized that these two claims are inextricably entwined and that the first is not waived by not perspicuously designating it in a Complaint. *Id. at 286.* Concealing a finance charge has a closer connection to TILA's purposes. *Id. at 287.*

Again, if these numerical disclosures are inaccurate due to hidden finance charges,[9] these inaccuracies cannot be remedied by disclosing that the

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[9]Petitioner does not challenge the ruling that the Itemization of Amount Financed is correctly disclosed, *if* these charges all properly belong in the Amount Financed in the first instance.

lender may be retaining a portion of the charges. 15 U.S. C. §1604(b). *See, Gibson v. Bob Watson Chevrolet-Geo,* 112 F. 3d 283 (7th Cir. 1997)(Posner, J.)(Numerical inaccuracies cannot be remedied by use of Model Form).

The cost of life insurance charged by PLI is demonstrably lower for cash transactions, as demonstrated by PLI's rates published in *Best Book,* an industry publication. Ms. Porter was charged $3281.98 for roughly $33,000 coverage on a declining basis allegedly for 15 years. PLI offered $2,500,000.00 in coverage over 10 years (i.e. $250,000 per year for ten years) for a smaller premium of $2,425.00 beginning in June of 1999, just shortly after Ms. Porter's loan in March of 1998. Thus, respondents clearly charged more for the credit life insurance than they would have for regular life insurance. Thus, it was improper for the Court below to dismiss the "fee splitting claims."

Indeed, the Respondents below admitted that the rate charged to Petitioner and other Pennsylvania residents was 140% higher than Pennsylvania's allowable rate for CLI, and could not produce documentary support showing permission from the Insurance Department for this deviation. Thus, the overcharge constitutes a hidden finance charge, absent proof it is legitimately part of the permissible premium for CLI under Pennsylvania law, which was lacking before the District Court.

Furthermore, a genuine dispute exists over the nature of the "recapture fee." Reports from Bank of America and Union Bank of California allegedly housing the "premiums" are labeled "Business

Retirement Programs" and each contains a Certification that they comply with ERISA requirements. Such a Certification is required by 29 U.S.C.§ 1101 *et seq.* only for trust funds for employee retirement benefits. Thus, for the putative class including Petitioner, a dispute exists over whether the $32.9 million is in reality disguised executive compensation, and thus hidden finance charges, particularly in light of (1) the spurious explanation of the recapture, as shown above, and (2) the quantitative and temporal correlation between the KESOP funding/withdrawals [10] on one hand and the "premiums" charged to borrowers and recapture fee, on the other hand, as shown above.

The "recapture fee" constituted roughly 30% of the total "premiums" charged pursuant to the common contracts. Because Petitioner was charged pursuant to these common contracts, that portion of her "premium" attributable to the "recapture fee" (i.e., about 30%) is a hidden finance charge.

Additionally, the Court below improperly resolved the issue of whether the recapture was supported by consideration when ignoring the conflict between the deposition witnesses and the correspondence, dated December 11, 2000, between the Respondents acknowledging the guarantee and

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[10]Indeed, if the KESOP was funded with credit life insurance premiums, the NationsCredit Respondents violated the National Banking Act, which precludes officers from receiving compensation from credit life insurance sales. 12 C.F.R. § 2.3. Moreover, if this is an retirement plan, the NationsCredit Respondents violated ERISA by using it to secure NCIC and NCCC's obligations to PLI. 29 U.S.C.§1103.

indemnification survived the "recapture," showing this "recapture fee" was not a legitimate charge for insurance in the first place.

Assuming *arguendo* the alleged facts about the recapture are true and the cost of the risk to PLI is $46 million, what was the purpose of the additional $57 million ($103 million minus $46 million) charged to the putative class? Assuming *arguendo* these facts are true, either $57 million or the $32.9 million are hidden finance charges, for these are not charges for insurance. Because Petitioner was one of the many who were charged for the spurious "premiums", she was charged a hidden finance charge.

Thus, the Court below erred when failing to examine the substance of the credit life insurance transactions and "premiums" charged to determine whether the "premiums" were in reality finance charges or contained hidden finance charges.

CONCLUSION

Petitioner respectfully requests that this Court (1) grant this petition, (2)vacate the decision below dismissing the claims for actual damages under TILA, (3) find that the "premiums" –or the hidden finance charges--are not properly excluded from the finance charges for TILA and HOEPA purposes, and (4) remand this case for proper determinations of the class certification, petitioner's individual claims for rescission and damages, and appropriate issues.

Respectfully submitted,
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(any footnotes follow end of each document)

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

No. 06-5099

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROSLYN PORTER, on behalf of herself and all others similarly situated, Appellant

v.

NATIONSCREDIT CONSUMER DISCOUNT COMPANY; PROTECTIVE LIFE INSURANCE COMPANY; FAIRBANKS CAPITAL CORPORATION; NATIONSCREDIT FINANCIAL SERVICES CORPORATION; NATIONSCREDIT INSURANCE; NATIONSCREDIT CORPORATION; and BANK OF AMERICA

July 21, 2008, Submitted Pursuant to Third Circuit L.A.R. 34.1(a)

August 12, 2008, Opinion Filed

Appeal from the United States District Court for the Eastern District of Pennsylvania. (Civ. No. 03-cv-03768). District Judge: Hon. Lawrence F. Stengel.

JUDGES: Before: McKEE, FUENTES and JORDAN, Circuit Judges.

OPINION

McKEE, Circuit Judge.

Roslyn Porter appeals the judgment the trial court entered in favor of defendants following a two-day bench trial in a suit she brought alleging various violations of federal and state law. For the reasons that follow, we will affirm.

As we write primarily for the parties who are familiar with this litigation, we need not detail the factual or procedural background. Rather, we only note that Porter alleged causes of action under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., the Home Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639, and the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Cons. Stat. § 201-1 et seq. Each of her claims arise from a credit life insurance policy that she purchased when she took out a residential mortgage. During the course of this litigation, and after the conclusion of the two day bench trial that resulted in the defense verdicts, the district court entered numerous Orders and Memorandum Opinions that thoroughly and succinctly explained why it was rejecting Porter's legal arguments, and why she was not entitled to relief against any of the entities she had

sued. *See Porter v. NationsCredit Consumer Discount Company*, Civ. No. 03-03768 (E.D. Pa. Feb. 9, 2004), 2004 U.S. Dist. LEXIS 13641, 2004 WL 1753255 (E.D. Pa. July 8, 2004); 229 F.R.D. 497 (E.D. Pa. 2005); , 2005 WL 1819974 (E.D. Pa. Aug. 1, 2005); 2006 U.S. Dist. LEXIS 14925, 2006 WL 851307 (E.D. Pa. March 31, 2006); 2006 U.S. Dist. LEXIS 41947, 2006 WL 1737544 (E.D. Pa. June 22, 2006); 2006 U.S. Dist. LEXIS 83161, 2006 WL 3333837 (E.D. Pa. Nov. 14, 2006); 2007 U.S. Dist. LEXIS 286, 2007 WL 30117 (E.D. Pa. Jan. 3, 2007); 2007 U.S. Dist. LEXIS 14328, 2007 WL 674709 (E.D. Pa. Feb. 28, 2007).

After reviewing the record and the arguments raised on appeal, we conclude that the arguments Porter raises merit no further discussion, and we will affirm the rulings of the district court substantially for the reasons set forth in the applicable Orders and Memorandum Opinions.

CIVIL ACTION NO. 03-03768

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

ROSLYN PORTER,
Plaintiff,

v.

NATIONSCREDIT CONSUMER DISCOUNT
COMPANY, et al.,
Defendants.

ORDER

AND NOW, this day of February, 2004, upon consideration of the NationsCredit Defendants' Motion to Dismiss (Doc. 12), Plaintiff's Response, and the Parties' Replies, it is hereby ORDERED as follows:

1. The Motion of the non-NationsCredit Discount Company Defendants (""Non-NCCD Defendants") to be dismissed is DENIED. Plaintiff has not responded to Defendants' claim that many of the entities involved are not, as a matter of law, "creditors." The Court is quite displeased with Plaintiff's unwillingness to address this issue; however, this statutory qualification necessarily turns on issues of fact, rendering a decision on it inappropriate at this time.

2. Defendants' Motion to Dismiss Plaintiff's claims on the basis that the purchase of credit life insurance was voluntary is DENIED. The Court notes that Defense

Counsel appears to have selectively misstated the law in his brief. 15 U. S. C. § 1605 (b) (1) states that, to be excluded from the finance charge, credit life insurance must not be a factor in the decision to approve credit, and the fact that it is not a factor must be disclosed to the debtor. On page 9 of his Motion to Dismiss, Defense Counsel seems to claim that a creditor's obligations end with mere disclosure to the debtor; as indicated by the face of the statute, this is not so. Selection of credit life insurance must actually not influence the creditor's decision on the loan. Plaintiff's TILA disclosure statement already reflected that Plaintiff would select credit life insurance. Although the Court rejects Plaintiff's arguments that there was inadequate disclosure or that Plaintiff did not affirmatively request credit life insurance, the fact that documents presented to the Plaintiff for signature already reflected her assent to credit life insurance calls into question whether NationsCredit actually required insurance coverage as a condition precedent to a loan. The Court notes, on this point, that the Plaintiff will have an extremely hefty task to prove that credit life insurance was required; the Court fully expects Defendants to move for summary judgment after discovery. As it is, this component of Plaintiff's case rests on a foundation that is only slightly better than a bald assertion. As the instantmotion is for dismissal, however, the Court must accept as true all facts as pleaded by the Plaintiff, however tenuous they may be. Because the existence of only one set of forms for Plaintiff to sign tends to contradict Defendant's claim that they did not require insurance coverage, Plaintiff has met her burden.

Defendants rely on Fisher v. Beneficial Finance Co. of Hoxise, 383 F.Supp. 895 (D.R.I. 1974). That opinion

deals with a motion for summary judgment by the plaintiff, not a motion for dismissal by the defendant. Further, the section of the ruling Defendants rely upon dealt with the plaintiff's offensive motion for summary judgment that the disclosure form in question failed, as a matter of law, to satisfy 15 U.S.C. § 1605(b) - not a defendant's defensive motion. The issue in Fisher was strictly whether the form used by the defendant was inadequate as a matter of law (under the facts of that case), and Judge Day held that it was not. In the next sentence after denying plaintiff's motion for summary judgment on this point, Judge Day wrote that his ruling "does not preclude the plaintiff from attempting to prove, during the trial of this action, that the defendant by its conduct did actually require credit life and health insurance to be purchased as a condition of said loan contrary to the statement signed by the plaintiff in said insurance authorization form." Id. at 900. Therefore, as the text of Fisher indicates, the case does not, by any rational or informed reading, negate "any argument that the insurance was not voluntary." Defendants' Motion to Dismiss at 18.

3. Plaintiff's alternative claim, that Defendants inadequately disclosed the exact amount retained by Defendants, is DISMISSED. The Court finds that the disclosure offered by Defendants was adequate as a matter of law (that the Defendant may be retaining a portion of the insurance premium). In the cases cited by Plaintiff, there was no disclosure that the defendants were retaining any portion of an amount paid to others; quite obviously, as there was a disclosure here, the cases are inapposite. Because the disclosures are adequate, it does not matter what Plaintiff intends to prove at trial so long as Defendants succeed in proving

that the credit life insurance was properly excluded from the finance charge.

4. Defendants' arguments relating to Plaintiff's insurance term claim are inappropriate subject matter for a motion to dismiss. Defendant has submitted to the Court an alleged copy of its agreement with Protective Life Insurance, indicating a contract term of 240 months. The Court will not look beyond the pleadings when deciding a motion to dismiss. Defendant may re-raise its argument in a motion for summary judgment in the future.

5. As to the issue of Plaintiff's failure to plead that she detrimentally relied on Defendant's alleged violation of TILA, the Court holds that the class claims for actual damages are DISMISSED. The face of 15 U.S.C. § 1640 (a) (1) clearly requires a consumer to show that any actual damages suffered were a result of a defendant's failure to comply with the TILA. This Court will not break with its brethren who have held likewise. See In re Smith, 289 f.3d 1155, 1157 (9t' Cir. 2002) ("We join with other circuits and hold that in order to receive actual damages for a TILA violation . . , a borrower must establish detrimental reliance.").

6. The Court holds that Plaintiff's claims are not time-barred. Although this Court will not take a position regarding whether Defendants were dilatory in Bankruptcy Court, the Court will view Plaintiff's claims as equitably tolled, as she apparently did not discover that she might have had a cause of action until after the normal statutory period lapsed.

7. As to Plaintiff's state law claims, the Court

recognizes that a conflict of authority exists pertaining to the pleading standard for claims brought under the Commonwealth's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 et seq. Although there is clearly some dispute regarding the effect of the rewritten "catchall" provision in 73 P.S. § 201-2(4) (xxi), this Court finds instructive the Honorable Judge McLaughlin's decision in Flores v. Shapiro & Kresmen, 246 F.Supp. 2d 427, 432 (E.D. Pa. 2002). In Flores, Judge McLaughlin held that the addition of the word "deceptive" to the catchall provision of the UTPCPL indicated a departure from the prior version of the statute, whose catchall provision was limited to fraudulent conduct. Judge McLaughlin also rejected the reasoning of Booze v. Allstate Ins. Co., 750 A.2d 877 (Pa. Super. 2000) for reasons which this Court accepts (and will not restate here). This Court must defer to the legislature's acts, and assume that they intended to modify the statute when they changed its language. Defendants' arguments on this point are therefore unavailing. With respect to Plaintiff's claims under § 201-2(4) (ii) and (iii),, the Court holds that these claims need not be pleaded with particularity, as they are for deceptive, not fraudulent, conduct. DiLucido v. Terminix International, Inc., 676 A.2d 1237 (Pa. Super. 1996). Commonwealth statute, 73 P.S. 201-9.2(a), quite clearly requires that a plaintiff allege causation to proceed. Plaintiff has done so.[1]

At some point, the Plaintiff class (if it is certified) will have to prove that Defendants' statements or omissions actually caused the class damage. On this issue, the Court notes that it has extremely grave concerns over the utility of classaction litigation in this case,

particularly concerning Fed. R. Civ. Pro. 23's requirements of typicality and common questions of fact. As there is no motion on this issue before the Court, and as such a motion could not be brought until discovery has progressed for some time, no further discussion of the issue is warranted.

8. The Parties will, from this point forward, obey the Court's pretrial protocol and procedure rules, which set limitations for the number of pages in supporting briefs.

9. Plaintiff's Counsel shall abide by the Court's standing orders regarding electronic submission of documents.

AND IT IS SO ORDERED.

Footnote

fn1 Defendant Protective Life, in a motion not dealt with in this Order, argues that a deceptive act is one arising from "a false representation made knowingly or recklessly with the intent that another person should detrimentally rely on it." (Emphasis in original). The Court notes that, using Protective Life's definition, the core issue is the state of mind of the defendant, not the plaintiff.

Filed 9/11/2008
No. 06-5099
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROSLYN PORTER, on behalf of herself and
all others similarly situated,
Appellant

v.

NATIONSCREDIT CONSUMER DISCOUNT COMPANY; PROTECTIVE LIFE INSURANCE COMPANY; FAIRBANKS CAPITAL CORPORATION; NATIONSCREDIT FINANCIAL SERVICES CORPORATION; NATIONSCREDIT INSURANCE AGENCY, INC, A Pennsylvania Corporation; NATIONSCREDIT INSURANCE AGENCY, INC, An Arizona Corporation; NATIONSCREDIT INSURANCE CORPORATION; NATIONSCREDIT CONSUMER CORPORATION; BANK OF AMERICA, N.A., and other defendants who are yet unknown to the plaintiff class*

(*Amended 2/28/07)

PRESENT: SCIRICA, Chief Judge, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having

been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT

15 U.S.C. § 1640

(a) **Individual or class action for damages; amount of award; factors determining amount of award**

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)

(A)

(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction,

(ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or

(iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637 (a) of this title, or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637 (b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610 (a)(2) of this title as any of the terms or items referred to in section 1637 (a) of this title or any of those paragraphs of section 1637 (b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637

(c)(1)(A)(ii)(I) or section 1637 (c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638 (a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610 (a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638 (a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.

(b) **Correction of errors**

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607 (e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent

of the annual percentage rate actually disclosed, whichever is lower.

(c) **Unintentional violations; bona fide errors**

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

(d) **Liability in transaction or lease involving multiple obligors**

When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

(e) **Jurisdiction of courts; limitations on actions; State attorney general enforcement**

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639 of this title may also be

brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 1607 of this title and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may—

(1) intervene in the action;

(2) upon intervening—

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

(f) Good faith compliance with rule, regulation, or interpretation of Board or with interpretation or approval of duly authorized official or employee of Federal Reserve System

No provision of this section, section 1607 (b) of this title, section 1607 (c) of this title, section 1607 (e) of this title, or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or

approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) **Recovery for multiple failures to disclose**

The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

(h) **Offset from amount owed to creditor or assignee; rights of defaulting consumer**

A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this subchapter.

(i) **Class action moratorium**

(1) **In general**

During the period beginning on May 18, 1995, and ending on October 1, 1995, no court may enter any order certifying any class in any action under this subchapter—

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor—

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 1638 of this title;

(ii) to properly make any other disclosure required under section 1638 of this title as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 1635 (a) of this title due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Board or from among forms based on such model forms.

(2) **Exceptions for certain alleged violations**

Paragraph (1) shall not apply with respect to any action—

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 1606 (c) of this title; or

(B) described in paragraph (1)(B)(iii), if—

(i) no notice relating to rescission rights under section 1635 (a) of this title was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

15 U.S.C. §1639 HOEPA DISCLOSURES

(a) Disclosures

(1) Specific disclosures

In addition to other disclosures required under this subchapter, for each mortgage referred to in section 1602 (aa) of this title, the creditor shall provide the following disclosures in conspicuous type size:

(A) "You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application.".

(B) "If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.".

(2) Annual percentage rate

In addition to the disclosures required under paragraph (1), the creditor shall disclose—

(A) in the case of a credit transaction with a fixed rate of interest, the annual percentage rate and the amount of the regular monthly payment; or

(B) in the case of any other credit transaction, the annual percentage rate of the loan, the amount of the regular monthly payment, a statement that the interest rate and monthly payment may increase, and the amount of the maximum monthly payment, based on the maximum interest rate allowed pursuant to section 3806 of title 12.

(b) Time of disclosures

(1) In general

The disclosures required by this section shall be given not less than 3 business days prior to consummation of the transaction.

15 U.S.C. §1602(aa)

(1) A mortgage referred to in this subsection means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential

mortgage transaction, a reverse mortgage transaction, or a transaction under an open end credit plan, if—

(B) the total points and fees payable by the consumer at or before closing will exceed the greater of—
(i) 8 percent of the total loan amount; or
(ii) $400.

15 USC § 1604. Disclosure guidelines

(b) Model disclosure forms and clauses; publication, criteria, compliance, etc.
The Board shall publish model disclosure forms and clauses for common transactions to facilitate compliance with the disclosure requirements of this subchapter and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures. In devising such forms, the Board shall consider the use by creditors or lessors of data processing or similar automated equipment. Nothing in this subchapter may be construed to require a creditor or lessor to use any such model form or clause prescribed by the Board under this section. A creditor or lessor shall be deemed to be in compliance with the disclosure provisions of this subchapter with respect to other than numerical disclosures if the creditor or lessor
(1) uses any appropriate model form or clause as published by the Board, or
(2) uses any such model form or clause and changes it by
(A) deleting any information which is not required by this subchapter, or

(B) rearranging the format, if in making such deletion or rearranging the format, the creditor or lessor does not affect the substance, clarity, or meaningful sequence of the disclosure.

12 C.F.R. 226.4

§ 226.4 Finance charge.

(a) Definition. The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

...

(d) Insurance and debt cancellation coverage —(1) Voluntary credit insurance premiums. Premiums for credit life, accident, health or loss-of-income insurance may be excluded from the finance charge if the following conditions are met:

(i) The insurance coverage is not required by the creditor, and this fact is disclosed in writing.

(ii) The premium for the initial term of insurance coverage is disclosed. If the term of insurance is less than the term of the transaction, the term of insurance also shall be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under §226.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.

(iii) The consumer signs or initials an affirmative written request for the insurance after receiving the

disclosures specified in this paragraph. Any consumer in the transaction may sign or initial the request.

12 C.F.R. § 226.23 Right of rescission.

(a) Consumer's right to rescind. (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.[47]

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures,[48] whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

Footnotes

[47] For purposes of this section, the addition to an existing obligation of a security interest in a consumer's

principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

[48] The term "material disclosures" means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and the disclosures and limitations referred to in §226.32 (c) and (d).

Amendment(s) published July 30, 2008, in 73 FR 44601
Effective Date(s): October 1, 2009
7. Section 226.23 is amended by revising footnote 48 to paragraph (a)(3) to read "The term `material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§226.32(c) and (d) and 226.35(b)(2)."

40 P.S. Sec. 1007.2. Scope of act; short title; definitions

(a) (1) This act will be known and may be cited as the "Model Act for the Regulation of Credit Life Insurance and Credit Accident and Health Insurance."

(2) All life insurance and all accident and health insurance in connection with loans or other credit transactions shall be subject to provisions of this act, except such insurance in connection with a loan or other credit

transaction of more than 20 years duration; and except such instance in connection with the first real estate mortgage, provided however, that such insurance in connection with a first real estate mortgage on a new or used mobile space home or dwelling trailer shall be subject to the provisions of this act regardless of the duration of the underlying loan or other credit transaction; nor shall insurance be subject to the provisions of this act where the issuance of such insurance is an isolated transaction on the part of the insurer not related to an agreement or a plan for ensuring debtors of the creditor.